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Argued by
ALFRED T. DAVISON.

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

—against—

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, *et al.*, ALMON G. RASQUIN, ELIZA B. CARMAN, *et al.*, BONDHOLDERS' COMMITTEE of which WILLIAM E. KENNEDY, JR., is Chairman, MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which FREDERICK S. ROBINSON is Chairman.

BRIEF OF PETITIONER REALTY ASSOCIATES SECURITIES CORPORATION.

This case is before this Court on certiorari granted February 4, 1935 (R., p. 167) to review the decree of the United States Circuit Court of Appeals, Second Circuit (R., p. 151), made December 10, 1934, which decree (Judge A. N. Hand dissenting), modifies the order (R., pp. 85, 97) of the United States District Court for the Eastern District of New York entered April 6, 1934 (confirming a composition in bankruptcy under Section 12 of the Bankruptcy Act), by increasing the compensation to which Eugene F.

O'Connor, Jr., as Referee in bankruptcy is entitled (by virtue of said composition) from $24,064.87, as fixed in said order of the District Court entered April 6, 1934, to the sum of $65,040.19, being one-half of one per cent. of the total amount of claims ($13,008,038.30) against the Bankrupt estate.

The appeal to the Circuit Court of Appeals by the Referee and an appeal by Mr. Fred L. Gross, one of the Receivers, with respect to the compensation to which he was entitled were consolidated, and hence the record certified by the Clerk of the Circuit Court of Appeals includes the appeal by said Fred L. Gross as Receiver, although on the appeal by Mr. Gross the order of the District Court was affirmed.

Opinions Below.

The opinion of the District Court (R., p. 102) is reported in 6 F. Supp. 549.

The prevailing opinion of the Circuit Court of Appeals (R., p. 152), and the dissenting opinion of Judge A. N. Hand (R., p. 161) are reported in 74 F. (2d) 61.

The Issue.

The statutory provision for compensation to a referee in bankruptcy, contained in Section 40 of the Bankruptcy Act (11 U. S. C. §68), is as follows:

> "(a) Referees shall receive as full compensation for their services * * * one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

By the terms of the composition offer the creditors received 15% of their claims in cash (namely $2,091,129.04) and were permitted to retain as evidence of the remaining

85% of their claims the existing outstanding bonds of the bankrupt upon which their claims were based.*

The Referee claims that his one-half of one percent. commissions should be computed on the basis that the creditors are receiving "upon the confirmation of the composition" the entire $13,008,038.30, which was the full amount of the claims filed and allowed or scheduled.

The District Court determined (based upon a finding by the District Court of the market value of the bonds retained by the creditors) that "the amount to be paid to creditors upon the confirmation of said composition" was $4,812,974.17, and awarded the Referee one-half of one per centum on this amount, namely, $24,064.87 (R., p. 97).

The petitioner claimed in the District Court and now claims that this amount was higher than the Court was required to find, that the Referee cannot claim compensation on more than the creditors received "upon the confirmation of the composition", and that the bonds which the creditors retained (reduced in principal by the 15% paid), formed no part of the amount paid to the creditors "upon the confirmation of the composition".

Inasmuch, however, as the petitioner did not appeal from the District Court's decision it is, of course, conceded that the $24,064.87 fixed by the District Court as the Referee's compensation cannot be reduced. The petitioner, however, is not thereby precluded from now showing that the amount to which the Referee is entitled is in fact even less than the amount awarded to him by the District Court, and that the decree of the Circuit Court of Appeals increasing that amount was erroneous and should be reversed.

---

* The claims against the bankrupt consisted almost entirely of claims based upon bonds ($12,631,949.67) issued under three indentures between the bankrupt and Manufacturers Trust Company as Trustee, and guaranteed by New York Investors, Inc. (R., pp. 7, 23). The only other claims aggregated $208,133.90 (R., p. 106), and of that amount, a claim in the sum of $207,583.95 was the subject of pending objections (R., p. 90).

STATEMENT OF FACTS.

Realty Associates Securities Corporation filed a voluntary petition in bankruptcy on July 10, 1933 (R., p. 2), and receivers were appointed (R., p. 48).

The nature of the claims against the bankrupt has already been stated (Footnote, p. 3, *supra*).

An offer of composition was made to the creditors by instrument dated February 16, 1934 (R., p. 8). The Referee's report thereon was made on March 12, 1934 (R., p. 45).

Terms of Composition Offer.

The offer of composition provides that:

> "The amount to be paid to all creditors * * * shall be fifteen per cent. (15%) of the amount of their claims as filed and allowed * * *. The remaining eighty-five per cent. (85%) of the amount on which said fifteen per cent. (15%) is computed shall be evidenced by the existing outstanding bonds as reduced and modified as hereinafter provided" (R., p. 9).

The creditors did not receive any new bonds or any new promises to pay from Realty Associates Securities Corporation.

The composition offer (R., pp. 8-27) provides for a modification of the bonds retained by the creditors by (in addition to the reduction by payment of 15% in cash):

> (1) extending the time for the payment of the principal of two of the issues of bonds to October 1, 1943, the date of the maturity of the third issue;
>
> (2) reducing the rate of interest from 6% to 5%;

(3) making the interest due prior to October 1, 1943 currently payable only out of earnings, but providing that such interest is cumulative and all accumulated unpaid interest is definitely payable, regardless of earnings, on October 1, 1943;

(4) giving bondholders representation of four Directors on the Board of twelve;

(5) imposing restrictions on investments by the Company, disposition of assets, and creation of any new debt.

The composition offer also provides that at the time of the partial payment (15%) the "existing outstanding bonds" should be stamped with a notation that they have been so reduced and modified (R., p. 11). Such modifications are more particularly described in the "notation of reduction and modification" attached to the bonds by way of an allonge, and in a new indenture referred to in the offer of composition, and filed therewith (R., p. 11).

This allonge was signed not by Realty Associates Securities Corporation, but by Manufacturers Trust Company, as Trustee under the new indenture (see Indenture, pp. 8-10). The allonge, therefore, constitutes merely a notation *by way of information* to inform the world as it deals with said bonds, that the holder has received a 15% partial payment thereof and is bound by provisions reducing the interest thereon.

The keeping alive of the outstanding bonds and *not giving any new undertaking or obligation* was in line with the insistence by bondholders that any rights which they had under the guaranty of New York Investors, Inc., should so far as possible be preserved and not be affected by the composition. Subdivision marked "10" of the offer of composition provides in this respect as follows (R., p. 23):

"10. This composition, including the modification

of the presently outstanding bonds and the indentures as hereinabove provided and the detaching of the coupons from the bonds, shall be without prejudice to the rights, if any, of holders of such bonds against New York Investors, Inc., arising out of, under or in connection with the guaranty of said bonds by New York Investors, Inc., and all causes of action, if any, accruing to said bondholders by reason of such guaranty are hereby reserved unto them."

Even the Referee will concede that if the existing bonds and the indebtedness created thereby were not continued, there was no possible way of carrying out the above quoted provision of the composition offer.

Provision is also made in the offer of composition for the issuance of Treasury Bonds to those creditors, few in number and small in amount, whose claims were not based upon presently outstanding bonds (R., p. 10).*

The Acceptance and Confirmation of the Composition.

The offer was accepted by a majority in number and amount of the creditors (R., p. 2 and pp. 54, 69).

The bankrupt deposited with the Clerk of the Court pursuant to Section 12 of the Bankruptcy Act and Bankruptcy Rule 13 for the Eastern District of New York, the sum of $2,255,000 in cash and also the assignment of a $275,000 mortgage which one of the creditors (Realty Associates, Inc.) had agreed to take in lieu of cash (R., pp. 54-55), to cover the amounts to be paid to creditors and the maximum amounts demanded by the Referee and the Receivers.*

---

* Because the District Court, sustained by the Circuit Court of Appeals, held on the first application for the confirmation of the composition that the composition could not be confirmed with the agreement contained therein (R., p. 3) to pay compensation and expenses to Bondholders' Committees and their

Application for confirmation of the composition was duly made by the bankrupt (R., p. 50), and a hearing was had before Hon. Clarence G. Galston, *D. J.*, on March 23, 1934 (R., p. 65).

The composition was confirmed by the judge by order entered April 6, 1934 (R., p. 85).

The Controversy as to the Amount of Referee's Compensation.

The bankrupt in its application for confirmation of the composition specifically objected (R., p. 56) to the computation of the commissions of the Referee on the amount of $13,008,038 as "the amount to be paid to creditors on this composition". The bankrupt also specifically objected (R., p. 56) to the inclusion of the face amount of the bonds retained by or delivered to creditors on the composition as the basis of the computation of commissions to the Referee or compensation by way of commissions to any Receiver, and also to the inclusion of any present value, market or otherwise, of such bonds in such computation.

The bankrupt, however, in its application for confirmation asked (R., p. 57) that it be permitted, if so advised, to offer on the hearing on such application proof of the actual market value of the bonds retained by creditors then holding outstanding bonds of the bankrupt, reserving the claim which it had *at all times* made that the only amount on which commissions might be computed is the amount of cash to be paid to creditors on such composition.

At the hearing on the application for the confirmation

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attorneys (69 F. (2d) 41, Cert. denied on application of Bondholders' Committee, 292 U. S. 628), the bankrupt had modified its offer of composition by an instrument dated February 16, 1934 (R., pp. 8-27) so as to eliminate therefrom the provisions for the payment to Bondholders' Committees and their attorneys (R., p. 28). The sum deposited with the Clerk of the Court, however, had included sums sufficient to cover the maximum amounts claimed by such Committees and counsel.

of the composition the Referee (among others) was present (R., p. 71).

Pursuant to the notice so given in its application for confirmation, the bankrupt offered on such hearing (on application for confirmation) two affidavits of dealers in investment securities, setting forth the market value of the bonds retained by the creditors, based upon actual sales, and also an affidavit setting forth the bid and asked prices of said bonds as the same appeared in the New York Times and the Commercial and Financial Chronicle (R., pp. 71-80).

The affidavits showed that the market value of the bonds retained by the creditors was 37% of par prior to the payment of 15% pursuant to the composition, and would be 22% of par after the payment of said 15% (R., pp. 73, 74 and 77).

Such affidavits were received *without objection from the Referee or any party* (R., p. 68).

At said hearing attorneys for creditors, and also creditors in person appeared to oppose the fees requested by the Referee and the Receivers as excessive (R., pp. 67, 69).

The District Court held that, although the 85% of the existing debt persisted undischarged (R., p. 106) it would be unfair to exclude such 85% entirely from the computation of commissions, and added the market value of the bonds retained by creditors to the amount ($2,091,129.04) actually to be paid to creditors upon the confirmation of the composition (R., p. 110). The market value of the bonds after the payment of the 15% in cash was found by the District Court to be 22% of par, or the equivalent of $220 for the 85% remaining due upon each $1,000 bond retained by the creditors (R., p. 107).

The Referee obtained leave, pursuant to Section 24b of the Bankruptcy Act, to appeal to the Circuit Court of Appeals (R., p. 122). The Referee also obtained from the District Judge an order allowing an appeal (R., pp. 115, 116).

The Circuit Court of Appeals modified (Judge A. N. Hand dissenting with opinion) the order of the District Court by holding that the Referee was entitled to compensation at the rate of one-half of one per centum upon the face amount of the bonds retained by the creditors, thus making the Referee's compensation $65,040.19.

Creditors Are Not to Be Paid 100%.

In the briefs which the attorneys for the Referee have heretofore filed in the Circuit Court of Appeals and in this Court, the statement has been made that

"Creditors are to be paid 100%."

Although we have challenged the correctness of that statement, the Referee has still seen fit to repeat it.

Therefore, at the outset of this brief we again challenge that statement in order that if the statement is again repeated it will be necessary for the Referee's counsel to show some authority therefor other than the mere statement.

Specifications of Error Intended to Be Urged.

The Circuit Court of Appeals erred:

1. *In holding that the face amount remaining due* upon the bonds which the creditors retained, rather than (if such bonds are to be considered at all) the value of such bonds (as found by the District Court) at the time of the confirmation of the composition, formed part of "the amount to be paid to creditors upon the confirmation of the composition", upon which the commissions of the Referee were to be computed under Section 40 of the Bankruptcy Act.

2. In holding that the amount remaining due upon the bonds which the creditors retained constituted any part

of "the amount to be paid to creditors upon the confirmation of the composition", and in allowing any commissions to the Referee on the amount so remaining due.

3. In allowing commissions to the Referee upon amounts which the creditors did not receive upon the confirmation of the composition, and may never receive.

4. In holding that the effect of the confirmation of the composition was to destroy the obligation upon bonds which the creditors were permitted to retain pursuant to the offer of composition, and to substitute a new obligation.

5. In holding that the court had no discretion in fixing the compensation of a Referee to limit such compensation to a reasonable amount.

ARGUMENT.

OUTLINE OF POINTS TO BE ARGUED.

I. Under the terms of the offer of composition the "amount to be paid to creditors upon the confirmation of the composition" was only 15% of the amount of their claims as proved and allowed or as scheduled, namely, not more than $2,091,129.04.

II. The Bankruptcy Act does not contemplate that the Referee should be paid a percentage on what the creditors do not receive.

Even if (contrary to petitioners' contentions) the bonds which the creditors retain may be included to any extent in the basis for computing commissions, nevertheless, the highest amount at which they could be so included is an amount sufficient to place the Referee on a parity with the creditors.

When, therefore, the District Court allowed to the Referee an amount equal to one-half of one per cent. of the market value of the outstanding bonds which the creditors retained, it placed the Referee in the same position as the creditors to the extent of one-half of one per cent. of the bonds so retained.

III. The value of the outstanding bonds retained by creditors was properly proved.

IV. The Court had discretion to limit the Referee's compensation to a reasonable amount.

POINT I.

Under the terms of the offer of composition the "amount to be paid to creditors upon the confirmation of the composition" was only 15% of the amount of their claims as proved and allowed or as scheduled, namely, not more than $2,091,129.04.

The decision of the Circuit Court of Appeals allowed the Referee commissions on the total amount of the claims,

namely, $13,008,038.30, although the amount actually to be paid to creditors upon the confirmation of the composition was only $2091,128.04.

As stated above, petitioner has always contended that the District Court, by including the market value of the bonds retained by creditors as part of the basis for computing compensation to the Referee, awarded the Referee an even larger fee than he was entitled to.*

The compensation claimed by the Referee ($65,040.19) for services covering a period of less than nine months, is considerably more than the salary of the President of the United States for the same period of time.

Certainly no court will sanction a construction of the Bankruptcy Act requiring the payment of such fees to the Referee unless required to do so by the plain mandate of the statute itself.

The statute, we submit, clearly does not require the payment of any such fees.

The measure of the referee's compensation is contained in Section 40-a of the Bankruptcy Act (11 U. S. C. §68):

> "SECTION 68. SAME: COMPENSATION—*a*. Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the

* This point is properly presented in this Court, because if the Referee has already received more than he was entitled to, the Circuit Court of Appeals had no right to reverse the District Court because of its adoption of an incorrect theory (cf. Indiana Farmers' Guide Publishing Co. v. Prairie Farmers Publishing Co., U. S. Supreme Court, December 3, 1934 (293 U. S. , 79 L. Ed. 153, 159)).

trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

The claim of the Referee and the decision of the Circuit Court of Appeals ignore two of the most important phrases in the statute, to wit (italics throughout brief unless otherwise indicated are ours):

"*the amount to be paid* to creditors"

and

"*upon the confirmation*"

The only payment made "upon" the confirmation of the composition was the 15%.

Even before discussing the question whether there is any *payment* apart from the 15% in cash, we are confronted with the fact that anything hereafter paid upon the bonds will not be paid "*upon*" the confirmation of the composition.

"Upon" (used in a temporal sense) is defined in the Century Dictionary as synonymous with "thereupon" which is in turn defined as "immediately after that: without delay". Obviously payment of the bonds at their maturity, viz. on October 1, 1943 (if then made), is not and cannot be payment immediately after or "upon" the confirmation of the composition on April 6, 1934.

Only by completely disregarding the meaning of this word "upon" could the Circuit Court of Appeals hold that the face amount payable in 1943 upon bonds retained by creditors, constituted part of the amount to be paid to creditors "upon" the confirmation of the composition.

Even though the ultimate payment of the bonds in 1943 (if then made) be considered to be a result of the composition, nevertheless the notion that payment *as a result* of a composition constitutes payment *upon the confirmation*

of the composition is contrary to the express language of Section 40. This notion was rejected in *In re Chimoritz*, 30 F. (2d) 114 (E. D. Mich.).

The error in the Referee's contention appears if it is carried to its logical conclusion. If the Referee were correct in claiming commissions upon all payments made in respect of the bonds for nine years after the confirmation of the composition, why should he not also be entitled to compute commissions upon the interest provided to be paid to creditors between 1934 and 1943? It is just as reasonable to argue that the interest forms part of "the amount to be paid to creditors upon the confirmation of the composition" as that the principal does.

It is no answer to argue that the bonds are income bonds, because by the terms of the offer of composition the interest at 5% is cumulative and must be paid on or before October 1, 1943 (R., p. 11)

> "any accumulated interest not theretofore paid to be paid at the time of the maturity of the bonds" (R., p. 12).

It is just as unreasonable to argue that the principal is paid "*upon* the confirmation of the composition" as to say that the interest is so paid. Just as the interest on the bonds cannot be considered part of the "amount to be paid to creditors upon the confirmation" so also the principal of the bonds cannot be said to be any part of the "amount to be paid to the creditors upon the confirmation" of the composition.

The retention of outstanding bonds by creditors does not constitute a payment to creditors.

Returning to the interpretation of "the *amount to be paid* to creditors", we find that the argument of the Referee is faced with another obstacle.

The composition makes no provision for any payment to creditors except in paragraphs 3 and 5 of the offer (R., pp. 9, 10), where it is provided that

> *"The amount to be paid to all creditors • • • shall be fifteen per cent. (15%) of the amount of their claims* as filed and allowed or if not filed and allowed then fifteen per cent. (15%) of the amount at which such claims appear in the schedules in bankruptcy filed herein."

There is no other payment.

The outstanding bonds which are retained do not constitute a payment to creditors; the creditors had the bonds in their possession at all times prior to the confirmation of the composition.

Surely the modification of the bonds does not constitute a payment.

Nor can the affixation by Manufacturers Trust Company of the *informatory* allonge, signed only by Manufacturers Trust Company, notifying the world that the bond is modified, constitute a payment.

It is clear, then, from the offer itself and also from the provisions of the order as to the payment of the sums provided for by the offer, that the only thing which was to be paid was "the 15% provided to be paid by the terms of said composition as so modified" (R., p. 94).

The case of *Kinkead* v. *J. Bacon & Sons*, 230 Fed. 362, cited in the prevailing opinion of the Circuit Court of Appeals (R., p. 156), is far from supporting the holding that the bonds retained by creditors constitute part of the amount to be paid upon the confirmation of the composition. What was held in the *Kinkead* case was that a waiver by certain creditors of *deposit* of the amount (35% in cash) agreed by the composition offer to be paid, did not deprive the Referee of his right to commissions upon such 35%. The Court thereupon held that

the Referee was entitled to commissions upon the 35% agreed to be paid and stated (p. 367):

> *"The amount offered by the bankrupt and accepted by the creditors became, upon confirmation, 'the amount to be paid creditors'."*

The Circuit Court of Appeals erred in holding (R., pp. 156-57) that the mere modification of bonds retained by creditors constituted *a payment* of the face amount remaining due upon those bonds.

The bonds retained by creditors do not constitute new bonds or new promises.

The creditors, after the confirmation of the composition, retain the rights which they formerly had upon the bonds which they held before the composition, reduced and modified in accordance with the provisions of the composition offer. As the District Judge stated in his opinion (6 F. Supp. at 551):

> "However one may view the transaction, *85% of the old debt persists.* It is not discharged. It survives in a modified form. To assert that acceptance of the offer of composition wipes out the old debt, because in terms it has been but modified, is to deal with verbal niceties which in no respect appeals to the conscience of the court" (R., pp. 106, 107).

The correctness of the District Judge's analysis is not open to question. This Court has stated that

> "• • • *the discharge destroys the remedy but not the indebtedness*" (*Zavelo v. Reeves*, 227 U. S. 625, 629).

The majority opinion of the Circuit Court of Appeals concedes this to be the law, stating (R., p. 157):

> "• • •; and it is settled that the effect of the dis-

> charge is to destroy the remedy but not the indebtedness. *Zavelo* v. *Reeves*, 227 U. S. 625."

and then immediately, in the next sentence, ignores such principle of law by stating:

> "Yet that is only of academic interest on this appeal for by the express terms of the accepted and confirmed composition offer the obligation of the old bonds was by agreement destroyed and supplanted by the new."

Where, we ask, is there anything in the offer of composition or the indenture which by agreement "destroyed and supplanted" the obligation to pay the principal of the existing bonds?

The indebtedness on the bonds to the extent of the 85% remaining due is not destroyed by the discharge which confirmation of a composition effects by virtue of Section 14-c of the Bankruptcy Act. The Bankruptcy Act merely provides that the confirmation of a composition creates a defense which affects the remedy, unless waived by the bankrupt in the composition offer or subsequently.

The offer herein preserves a part of the remedy, and prevents the bankrupt, as to the 85% remaining due on the bonds retained by creditors, from pleading a discharge based upon the confirmation of the composition; but the claims of creditors are still upon the indebtedness, originally created by the bonds, which indebtedness was not destroyed.

No new obligation for the payment of the 85% balance was made, because to substitute a new bond might have nullified one of the essential terms of the composition, without which the offer might not have been accepted by the bondholders, namely, that any rights under the guaranty of New York Investors, Inc., are not to be in any wise affected by the composition.

Moreover, the indentures under which the bonds were originally issued are still kept alive as modified, the new

indenture simply providing that nothing shall constitute a default under them, unless it is also an event of default under the new indenture (R., p. 21); this modification of the previous indentures is to meet the new conditions brought about by the bankruptcy and composition.

The various modifications effected in the bonds by the offer of composition and the new indenture do not affect the *substance* of the obligation in such a way as to justify the Circuit Court of Appeals' statement (R., p. 157) that they are equivalent to new bonds. The amount due is still fixed by the identical bonds; the only promise is the promise contained in such bonds, the allonge being merely informatory, and not signed by the bankrupt; the obligation upon the bonds is simply reduced in principal amount by a partial payment; and the amount of interest required to be paid under their terms is reduced by the agreement effected with the creditors. The other modifications constitute restrictions on the activities of the bankrupt in the future. Any new provisions of the indenture are merely incidental covenants, and not new covenants for the payment of money.

The bankrupt has thus only partially waived its defense of discharge.

That the debt on the outstanding bonds continues is also made clear beyond any question by the language of the order confirming the composition:

> "Ordered (2), that Realty Associates Securities Corporation be and it hereby is discharged of all its debts *other than such debts as are based upon such proportion of the existing bonds of Realty Associates Securities Corporation as continue and remain in existence as reduced and modified pursuant to the terms of said offer of composition as so modified*" (R., pp. 92, 93).

Another path leads to the same conclusion. If the outstanding bonds were part of the consideration they would have had to be deposited.

Section 12 of the Bankruptcy Act (11 U. S. C. §30) provides that

> "An application for the confirmation of a composition may be filed in the Court of Bankruptcy *after, but not before* * * *, the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the Judge."

Rule 13 of the Bankruptcy Rules of the District Court of the United States for the Eastern District of New York provides:

> "13. Application for Confirmation of Composition.
>
> "Application for the confirmation of a composition shall be filed, in all cases, with the Clerk of the Court, *and the consideration to be paid by the bankrupt to his creditors* and the money necessary to pay all debts which have priority and the costs of the proceedings *shall be deposited with the Clerk*, who shall certify the fact to the Court, and thereupon a day for the hearing before the Judge shall be fixed by the order of the Court."

In this case this composition and the confirmation thereof proceeded on the unquestioned basis that when the bankrupt deposited with the Court sums sufficient to pay the 15% of the amounts of the claims of the creditors and the money necessary to pay all debts which have priority and the cost of the proceedings, it had deposited with the Court the entire "consideration to be paid by the bankrupt to his creditors". This is amply proved

by the Court's undisputed finding that the consideration to be paid by the bankrupt had been duly deposited (R., p. 85).

The outstanding bonds cannot possibly constitute any part of the "consideration to be paid by the bankrupt to his creditors", because those bonds could not possibly have been deposited or filed with the clerk or any one else. By the same token, they cannot constitute part of the "amount to be paid to creditors upon the confirmation of the composition".

Commissions may be computed only upon sums actually disbursed to creditors.

One of the fundamental principles which all courts have applied in cases involving commissions of a referee is that commissions may not be claimed upon sums which are not in fact disbursed to creditors.

This principle was applied in *In re Chimovitz*, 30 F. (2d) 114 (E. D. Mich.), which the Circuit Court of Appeals did not attempt to distinguish, and which is squarely contrary to the claim made by the Referee in the present case, that he is entitled to commissions on all that the creditors may ultimately receive at the end of nine years. The offer of composition in that case provided for a 40% payment to unsecured creditors. No payment was to be made to secured creditors, but the property of the bankrupt was to be restored to it subject to the same liens as before. The receiver claimed commissions computed on the total indebtedness secured and unsecured on the ground that the secured creditors would ultimately be paid as a result of the composition.

The Court (Tuttle, *D. J.*) rejected this contention, stating that it required a forced construction of the words "amount to be paid creditors on such composition", and

allowed a fee based only upon the amount presently payable to unsecured creditors and said:

> "It is urged by the receiver that because, *as a result* of this composition, the property of the bankrupts subject to the liens in question was returned by the receiver to the bankrupts, and thus made available to the secured creditors for enforcement of payment of their secured indebtedness, the amount of such indebtedness should be considered as part of 'the amount to be paid creditors on such composition', within the meaning of the language of section 48 just quoted. No authority has been cited, and I know of none, in support of this contention. I have carefully considered the argument of the receiver in this connection, but am unable to agree with it. In my opinion, such argument not only requires a forced, unnatural construction of the words 'amount to be paid creditors on such composition', but also overlooks and ignores the equally plain language of section 48 preceding the words last quoted and limiting the commissions of receivers to 'commissions upon the moneys disbursed or turned over * * * by them'. I am satisfied that the contention of the receiver in question is without merit and cannot be sustained, and that the referee did not err in fixing the fee of the receiver at the amount to be paid according to the terms of the composition in the case, to unsecured creditors of the bankrupts" (p. 115).

That case is almost a complete parallel with the present one. (The statutory limit for the fixation of compensation of a Receiver, contained in Section 48, is practically the same as the provision in Section 40-a with respect to compensation of a Referee.) There is no more reason why commissions should be allowed upon the balance of unsecured bonds which remains due after the composition in this case than upon the balance of secured claims which remained due after the *Chimoritz* composition.

Another case where the same principle was applied, even though it worked apparent hardship upon the referee and the trustee, is *American Surety Co.* v. *Freed*, 224 Fed. 333 (C. C. A. 3). The assets sold in that case under the direction of the Referee were appraised at over a million dollars but were encumbered by a mortgage for a million dollars to secure bonds of a like amount. The property was sold to a Bondholders' Committee, subject to such mortgage, for $75,000 in cash. Although both the referee and the trustee claimed commissions upon $1,075,000, the Court held that the commissions could be computed only upon the amount of cash payable and not upon the entire value of the property. The Court declared (pp. 337, 338):

> "It does not appear from the petition for an order of sale or from the decree ordering the sale, or from any feature of the general plan of reorganization, that anything other than the cash consideration was to be paid to or to be received by the trustee."
>
> * * * * * * *
>
> "The consideration paid, represented but a part of the value of the property, because the rest of the value of the property was affected and covered by encumbrances; but the consideration paid and disbursed represented all the value of the property which the trustee had to sell, and for which a consideration was to be received and disbursed by him."

An attempt to apply a theory of "constructive receipt", in order to obtain commissions upon funds which did not in fact pass through the estate, was also defeated by the Circuit Court of Appeals, Second Circuit, in *In re New York Commercial Co.*, 231 Fed. 445. In that case the trustees had realized a profit of $50,000 by the sale of rubber contracts. The lower court (Judge Augustus N. Hand) held that, although the total volume of business represented by the rubber transactions was about $900,000

the trustees "never were in the position of even constructive possessors of a fund" (of $900,000) "as in the case of *In re Columbia Cotton Oil etc. Co.*, 210 Fed. 824". This decision was affirmed by the Circuit Court of Appeals on the ground

> "that it can not be said that the trustees disbursed the money received from the sale of the rubber except as to the $50,000 profit upon which commissions were allowed" (p. 447).

See also:

In re Elk Valley Coal Mining Co., 213 Fed. 383 (W. D. Ky.);
In re Wallace, 14 F. (2d) 534, 539 (E. D. Okla.);
6 Remington, Bankruptcy §2742.

The principle that commissions cannot be calculated upon sums which are not actually disbursed finds expression also in the cases which hold that referees are not entitled to commissions upon re-claimed property, since property returned to its owners by virtue of reclamation proceedings, does not constitute a payment to creditors (see *In re Morris Bros.*, 8 F. (2d) 629, D. Ore.).

This same pripciple, which in the *Freed* case (*supra*, p. 22) denied to the trustee and referee commissions upon assets not disbursed by them, applies where the referee —as in the present case—attempts to claim commissions on sums not paid or to be paid to creditors upon confirmation of the composition, but to which they retain a right by virtue of the bankrupt's pre-existing obligation.

Not even a constructive future disbursement was made in the present case of the 85% evidenced by the existing outstanding bonds, for no new notes or new promises of any sort were given to the creditors. They simply *retained* what they already had. The modification and restriction

of their right to enforce payment upon the bonds which they retained can on no theory be considered a *payment* on the basis of which the Referee is to be compensated.

Neither of the cases

In re Batterman Co., 231 Fed. 699 (C. C. A. 2);
Kinkead v. *Bacon & Sons*, 230 Fed. 362;

relied upon by the prevailing opinion in the Circuit Court of Appeals in this case, supports the reasoning of the decision of the Circuit Court of Appeals which is now being reviewed. Those cases held only that creditors' waiver of the *deposit* of consideration by the bankrupt did not deprive the Referee of commissions on the amounts in fact agreed by the offer of composition to be paid to creditors upon its confirmation.

Neither of the above cases involves a holding that bonds which were extended by an offer of composition constitute part of the amounts upon which a Referee was entitled to commissions. So far as either is relevant, it supports the District Court's decision, as is further shown elsewhere in this brief (pp. 15, 34-36).

General Order XLVIII (4) shows the error in the decision of the Circuit Court of Appeals.

This Court recognized that the mere extension of indebtedness by a composition in bankruptcy did not constitute a payment to creditors upon the confirmation of the composition, when it promulgated General Order XLVIII (4), under Section 74 of the Bankruptcy Act.

That order provides first that:

> "For the purposes of computing the commissions of the referee and of the custodian or receiver the term 'composition' as used in sections 40 and 48 of the Act shall be deemed to include an extension proposal."

If the amount of the debts which were extended could be regarded as being paid to creditors upon the confirmation of a composition, the portion of the order quoted above would, standing alone, have entitled referees and receivers to commissions upon such amounts. Because, however, such was not and is not the law under Sections 12 and 40, this Court found it necessary to go further and change the existing law by adding to the provisions already quoted the following additional clause:

> "and the amount of the debts whose maturity is to be extended thereunder, and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be 'the amount to be paid creditors' within the meaning of said sections."

We submit that the mere fact that this Court found it necessary to add the above last quoted provision, indicates very clearly that the existing law, in the absence of the above quoted provision, would not have included "debts whose maturity is to be extended" in the amount on which the compensation of the Referee is to be computed.

The Circuit Court of Appeals disregarded the rule which is the implied foundation of General Order XLVIII, namely, that debts which are merely continued in existence after the confirmation of a composition, by a waiver of the defense of discharge, do not constitute payments to creditors upon which officials can claim commissions.

It is a recognized rule of statutory construction that an amendment is not to be disregarded by holding that the law meant the same thing before the amendment as after.

United States v. *Southern Pacific Co.*, 230 Fed. 270, 275;

Mabie v. *Fuller*, 255 N. Y. 194, 201;

People ex rel. Sheldon v. *Board of Appeals*, 234 N. Y. 484, 495;

People v. *Weinstock*, 117 App. Div. 168, 170, reversed on other grounds, 193 N. Y. 481.

The fact that such an order was deemed necessary by this Court compels the inference that, *but for the provisions of the new General Order*, debts extended under Section 74 of the Bankruptcy Act could not be regarded as part of "the amount to be paid creditors", and could not be included in the basis of computation of compensation.

Acceptance of the Referee's position is not necessary in order to prevent injustice in future cases.

The Referee argued in the courts below, and doubtless will here, that acceptance of the petitioners' position that the bonds constituted no payment to creditors upon which commissions are to be computed would make it possible for creditors, by foregoing any cash payment upon their indebtedness, to deprive officials of substantially all their compensation.

The fallacy of such an argument is apparent.

In the first place, the success of an offer which undertook to reach that result would be practically impossible—and in fact unthinkable to one who is familiar with the negotiations with creditors in this case. A composition can be effected only upon acceptance by a majority in number and amount of creditors. It is unthinkable that creditors would accept a composition which did not provide for any payments to them if the bankrupt had any assets out of which payment could be made.

In the second place, the Referee so far as compensation is concerned must go along *pari passu* with the creditors and cannot be paid on any different basis from creditors. If there is nothing to be disbursed—composition or no composition—the Referee gets no commissions. If the bankrupt's assets, after the cash payment, consist simply

of non-liquid mortgages (R., p. 6), there is no reason why the Referee should be paid commissions upon them as if they were cash.

Finally, it would be improper for the Court to adopt a strained, unnatural and unjust interpretation of the statute in the present case simply for fear of what may happen in some fanciful future case. If creditors should adopt a subterfuge to deprive referees or receivers of just compensation, the courts can surely be trusted to find a remedy. They are not required to order the payment of $65,000 to a referee in a case where the amount actually paid to creditors is only $2,091,129 (R., p. 57), simply to forestall the possibility that creditors may some time in the future be induced to accept a composition that offers them nothing, in the hopes of thereby cheating the Referee.

POINT II.

The Bankruptcy Act does not contemplate that the Referee should be paid a percentage on what the creditors do not receive.

Even if (contrary to petitioners' contentions) the bonds which the creditors retain may be included to any extent in the basis for computing commissions, nevertheless, the highest amount at which they could be so included is an amount sufficient to place the Referee on a parity with the creditors.

When, therefore, the District Court allowed to the Referee an amount equal to one-half of one per cent. of the market value of the outstanding bonds which the creditors retained, it placed the Referee in the same position as the creditors to the extent of one-half of one per cent. of the bonds so retained.

The applicable statute, the interpretation of which is the sole issue, is Section 40 (a) of the Bankruptcy Act

(11 U. S. C. Sec. 68), which has already been quoted, pages 12-13, *supra*.

The petitioner, reserving the claim which it had at all times made, that the only amount on which compensation of the Referee can be computed is the amount of cash to be paid to creditors upon the confirmation of such composition, proved before the District Court that the market value of the bonds retained by the creditors was 37 prior to the payment of the 15% pursuant to the composition and 22 after the payment of such 15% (R., pp. 71, 80).

Such proof was received without objection from the Referee or any party (R., p. 68).

No other proof was offered with reference to the market value of the bonds.

The Referee was present when such proof was offered (R., p. 69).

Based upon such proof the District Court found (R., p. 97) that the amount to be paid to creditors upon the confirmation of the composition is $4,812,974.17 and awarded the Referee one-half of one per cent. on that amount, namely, $24,064.87.

Notwithstanding this proof, however, the Referee by the decision of the Circuit Court of Appeals, is treated as if the creditors were receiving one hundred cents on the dollar upon the confirmation of the composition, whereas they are in fact to be paid only fifteen cents on the dollar upon the confirmation of the composition, with the right to retain outstanding bonds worth an additional twenty-two cents on the dollar at the time of confirmation of the composition.

If the bonds retained by creditors are to be considered in any manner as part of the amount paid to creditors upon the confirmation of the composition, they surely cannot in reason or justice be counted as representing a payment of

more than their value at the date of confirmation. No logical basis has been suggested by the majority opinion of the Circuit Court of Appeals, or by the respondent, for regarding the retained bonds as if their face amount were agreed to be paid upon the confirmation of the composition.

Furthermore, the only common sense way of dealing with the question is on the basis of the real and actual value of the bonds.

What did the creditors receive?

Concededly they only received 15% in cash plus (assuming for the purpose of the argument that bonds may be considered) such amount as they may realize on the retained bonds, whether it be nine years from now or by sale in the open market at any time previous thereto.

The Bankruptcy Act does not contemplate that the Referee should be paid a percentage *on what the creditors did not receive.*

If the Referee was entitled to any commission at all on the bonds (and we believe he was not), and if the Referee believed that the bonds were worth more than 22 after the termination of the bankruptcy (as a result of the confirmation of the composition), he could easily have asked that a part of his commissions be paid in bonds, equivalent, at par, to one-half of one percent. of the amount remaining due on the outstanding bonds; in such case it is very plain that if the Referee had received bonds in payment of his commission on such bonds he would have been treated in the same way as the creditors. The only way to assure in such a case that the Referee would be paid his percentage *pari passu* with creditors and not in advance of any receipts by the creditors, would be to pay his commissions in bonds so that he might receive the cash *if and when, and only if and when,* the creditors receive their 85% or some part thereof.

The Court, by allowing the Referee $24,064.87, accomplished this very result, because it gave him an amount of cash equivalent to what he could get by selling his bonds (if commissions had been paid in bonds) in the open market, or with which, if he so desired, he could or can purchase in the open market a sufficient amount of bonds to equal one-half of one per cent. of the face amount of the bonds.

The prevailing opinion of the Circuit Court of Appeals indicates that that Court agreed with the correctness of the principle adopted by the District Judge in putting the Referee on a parity with the creditors, but the majority of the Circuit Court of Appeals, erroneously as we believe, refused to apply any such principle to this case. The prevailing opinion of the Circuit Court of Appeals says (R., p. 156):

> "* * * Where the bankrupt's payment is all in cash no difficulty can arise in computing the compensation of the referee. If property in kind should be the subject matter of the offer in whole or in part some means would have to be found for determining the statutory fee of the referee and whether or not that would take the form of finding the value in money of the property to be turned over to creditors and taking the proper percentage of that need not now be decided."

We respectfully submit that the District Judge, in allowing the Referee a commission upon the value of the bonds, actually treated the case on the basis of "property in kind" being "the subject matter of the offer" "in part". Therefore, the District Judge's decision was entirely in harmony with the logic of the Circuit Court of Appeals in this case and consonant with the real facts in this case.

We also respectfully submit that the very fact that the majority of the Circuit Court of Appeals have refused to follow the very principle which they themselves admitted to be sound, is persuasive ground for the reversal of the decree.

Bearing in mind that it is a duly proven fact in this case as found by the District Judge (R., pp. 97, 107) that the market value based on actual sales of the bonds was 37% of their par value prior to the payment of the 15% of the face value thereof as called for by the terms of the composition, and 22% after payment of such 15% of the face value of the bonds pursuant to the offer of composition, it is clear that on this basis the Referee was placed in this position:

The Referee was awarded	$24,064.87
One-half of one per cent. of the amount paid to creditors ($2,091,129.04—R., p. 57) is	10,455.65
Balance to cover value of, or for purchase of, bonds	$13,609.22
The face amount of the outstanding bonds which evidence the remaining 85% of the claims is $10,916,909.26 (the difference between the total amount of claims ($13,008,038.30), and the amount paid to creditors ($2,091,129.04)).	
One-half of one per cent. of the face amount of the bonds is, therefore, $54,584.55 in bonds which at 22 amounts to, or which the Referee could buy at	12,008.60
Balance over and above value of the bonds or still left for purchase of more bonds	$ 1,600.62

From the foregoing, therefore, it conclusively appears that the Referee was more than placed on a parity with the creditors.

Surely the fact that such a procedure yields a fair result is a persuasive indication that so far as the Referee is concerned, it is a proper interpretation of the statutory provision for commissions.

Nor would there be anything improper in any step of the procedure above suggested.

Certainly there would be no impropriety in delivering bonds to the Referee in part payment of his commission, if he would rather have bonds than their market value; and if bonds were so given to the Referee he obviously could sell them. If the Referee could sell bonds he certainly could buy them, because when the composition is confirmed the bankruptcy is at an end and the Referee's duties in connection with the case are finished.

We respectfully submit that there is not the slightest suggestion of impropriety in the Referee buying bonds after the bankruptcy has terminated; if the Referee had any possible question concerning any such procedure and still believed that the bonds were worth more than 22, their value as proved, he could easily have applied for the Court's permission or sanction to so place himself on a par with the other creditors by purchasing bonds, especially when all this would be done after the confirmation of the composition and the termination of the bankruptcy proceeding.

The statute does not contemplate, and fairness forbids, that a Referee should be paid on the basis of a sure thing, when creditors at the best still have the risk that the bankrupt may not succeed in working out a difficult situation over a period of nine years.

If a creditor had wished to turn the balance of his bonds into money, he could not have received 85% in cash

from them, but only the 22% which was the market value. Why, therefore, should the Referee be paid on the theory that the bonds were equivalent to the face amount remaining due thereon in cash?

In effect the creditors permitted the balance of their debt to remain unaffected, and the property of the corporation to be turned back to the bankrupt; the Referee has been sustained by the Circuit Court of Appeals in having his compensation computed upon the *book value* of that property; but it is clear that commissions cannot be claimed upon any value or property turned back to the bankrupt. *Re Detroit Mortgage Corporation*, 12 F. (2d) 889 (C. C. A. 6).

The assets of the bankrupt consisted: First, of approximately $3,250,000 in cash and marketable securities (R., pp. 5-6), most of which were used for the 15% cash payment to creditors (R., pp. 36, 84); and the balance of the assets, having a book or face value of approximately $13,000,000 and described in the inventory as "non-liquid assets" (R., p. 6), comprised first and second mortgages and instalment contracts for the sale of real estate, and equities in parcels of real estate (R., p. 6), the total number of separate parcels of real estate involved being approximately 3,000 (R., p. 30).

Any person knows that real estate and second mortgages, which comprised the bulk of the bankrupt's assets, cannot be liquidated at par today. If they had been liquidated or subjected to forced sale the amount on which to compute commissions would not only have been far less than their face value, but even less than the market value of the bonds which depended upon them for their ultimate payment. It is entirely unreasonable and wholly illogical that the Referee should be paid larger compensation by virtue of a composition effected relatively quickly

than he would obtain for longer services in supervising liquidation.

The results accomplished by the award which the District Judge made clearly demonstrate that the Referee has been paid by the highest standard which could be applied under the statute, even if commissions can be computed on more than the 15% cash paid to the creditors.

Notes or stock which are paid to creditors as part of the consideration for a composition have been held, in the only reported decisions on the question, to constitute payment for the purpose of computing commissions only to the extent of the value fixed upon them at the time of confirmation.

The holding of the Second Circuit Court of Appeals itself in *In re Batterman Co.*, 231 Fed. 699, which was correctly interpreted by the District Judge (R., pp. 107-09), and by Judge Augustus N. Hand (R., p. 162), supports petitioner's argument.

In the *Batterman* case, the composition took place on the basis of an offer to pay 65% of the indebtedness in cash, and subsequently certain creditors agreed to waive the deposit of such cash and to accept, in lieu of such 65% in cash, the following:

85% of their claims in notes of a third party,
15% of their claims in cash.

The Circuit Court of Appeals affirmed the Court below in holding that the alternative offer, made in consideration of the waiver of the deposit of 65% in cash, was to be considered not as a 100% payment but only as equivalent to a 65% payment, namely, the 65% in cash which the bankrupt had offered. Certainly there is nothing in that case on which the Circuit Court of Appeals can hold

that because the creditors received notes and cash which together equalled in face amount 100% of their claims, the Referee was entitled to commissions on the entire 100%.

The Court there, in referring to the notes and reduced cash payment which certain creditors had agreed to accept in lieu of the cash provision made in the offer of composition, stated:

> "the 15 per cent cash and the 85 per cent in notes are to be regarded as equivalents of the 65 per cent of the claims in cash which was to be paid under the composition agreement",

and allowed commissions on the basis of 65% payment and not on 100% of the claims, although the creditors in question received 15% in cash and a promise to pay the remaining 85%.

The fact that the notes offered in the *Batterman* case were those of a corporation other than the bankrupt furnishes no distinction, for it is a perfectly usual thing for all or part of the consideration of a composition to be supplied by a third party, as is shown by many instances in the reports.

> *Zavelo* v. *Reeves*, 227 U. S. 625;
> *Wechsler* v. *U. S.*, 27 F. (2d) 850 (C. C. A. 3);
> *In re Laubheim Bros. Inc.*, 22 F. (2d) 910 (C. C. A. 2).

By agreeing to substitute the new notes plus 15% in cash for a 65% cash payment, the creditors in the *Batterman* case had themselves placed a value upon the notes. In the present case there is no cash offer beyond the 15%, from which to calculate the value of the bonds, but that does not alter the fact that the creditors did not actually receive more than the value of the bonds which they retained. The Referee has no justifiable ground of com-

plaint if he is awarded compensation on the basis of the value of such bonds.

If, in the present case, the bankrupt had chosen to offer to its creditors a choice between 37% in cash* on the one hand and 15% in cash plus the right to retain the outstanding bonds for the 85% balance on the other hand, the situation would be on a par with that in the *Batterman* case, and no one could question the Court's adoption of a 22% value for the balance remaining due on the existing bonds after the payment of the 15% cash. That machinery not having been used, it was necessary for the Court to figure the value in some other way; and certainly the market value, which was adequately proved (as is more fully shown below) was the proper test.

The value of stock accepted by creditors in lieu of cash was adopted as the basis of commissions *In re Mills Tea & Butter Co.*, 235 Fed. 815 (D. Mass.), which is also in conflict with the decision of the Circuit Court of Appeals now being reviewed. The facts and argument as stated by the Court were:

> "The creditors were offered an option of 25 per cent. cash, or 100 per cent. in the stock at par of a new corporation formed to take over the assets and business of the bankrupt. The learned referee, in computing his commissions, figured the stock as worth par. No evidence was offered as to what its value really was. A substantial proportion of the creditors, viz. about one-half in number and one-quarter in amount, elected to take the cash instead of the stock, which would indicate that the alternatives offered were nearly equivalent."

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*The Court has found—on evidence admitted without objection—that the market value of the bonds retained by the creditors was 22%, in addition to the 15% which they received in cash.

The Court considered the *Batterman* case as authority that the stock could and should be valued at less than par, and in the absence of other proof of the value of the notes, adopted as the basis upon which to compute the Referee's compensation the value which the creditors themselves had placed upon it, namely, that the 100% in stock was equivalent to 25% in cash, and concluded:

> "It seems to me that the principle of that decision applies here. Upon the case as it stands, the 25 per cent: cash, and the 100 per cent. stock, are to be regarded as equivalents. The referee's commissions are to be computed on the basis of a 25 per cent. cash disbursement, unless he has reason to believe that the stock is worth more than the cash, and desires to present evidence on that point, in which case the matter may be set down for hearing before me."

There is no more justification for treating bonds as worth their face amount when they are not, than for treating stock as worth par. The decision should apply with equal force to the bonds in the case at bar.

Even if the bonds which the creditors retained are to be considered in computing the commission of the Referee nevertheless it is clear that such bonds should be regarded as worth only what they were worth on the market; and it follows that the Court by allowing to the Referee a sufficient amount of money to place him on an absolute parity with the creditors, has thereby given to the Referee the maximum amount which under the law he is entitled to.

POINT III.

The value of the outstanding bonds retained by creditors was properly proved.

The sufficiency of the proof of value of the outstanding bonds seems not open to question. We refer to it simply in order to forestall an argument of the Referee, advanced for the first time in the Circuit Court of Appeals, but which neither the majority nor the dissenting judge has considered of sufficient merit to mention in either of their opinions.

The affidavits as to value of bonds were introduced pursuant to the intention expressed in, and notice given by, the application for confirmation (R., p. 57) and were received *without objection from the Referee or any party* (R., p. 68).

The admissibility of the affidavits as to value is not open to dispute.

The three affidavits as to the value of securities (R., pp. 71-80) were filed in open court, on notice (R., p. 57) to and in the presence of the Referee, who was in attendance in the courtroom (R., pp. 66, 71).

These affidavits, containing quotations of actual sales in the open market, were clearly *relevant* as proof of value. Such selling price is the recognized test of value (1 Wigmore Evidence, Sec. 717). In fact where there is such evidence the intrinsic value of the assets owned by a corporation will not be considered. *Cate* v. *Fisk*, 175 App. Div. (N. Y.) 235; *United States* v. *Reading Co.*, 295 Fed. 551, 554 (E. D. Pa.).

Any objection to the *competency* of the proof was waived by the failure to make it at that time. Even assuming that

the rules of evidence upon such a hearing are to be enforced with the same rigor as upon a trial at common law, and that the bankrupt might have been required to put value witnesses on the stand for cross examination, nothing is better settled than that an objection not seasonably made to the competency of evidence is waived, and that evidence not objected to is deemed to be admitted by consent.

The rule is clearly stated in Wigmore on Evidence (2nd Ed.) §18, page 173:

> "The initiative in excluding improper evidence is left entirely to the opponent,—so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is *waived*."

See also *Diaz* v. *United States*, 223 U. S. 442, where a conviction for homicide, based in part on testimony taken before a justice of the peace in a different action, was affirmed:

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible."

See also *Bain* v. *United States*, 262 Fed. 664 (C. C. A. 6).

This rule of evidence is specifically embodied in the Rules of the Circuit Court of Appeals for the Second Circuit, which provide in Rule XI:

> "In all cases of equity or admiralty jurisdic-

tion, heard in this Court, no objection shall be allowed to be taken to the admissibility of any *testimony, deposition,* deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the Court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

Also to the same effect, Rule XVI of this Court provides:

"In all cases of equity or admiralty jurisdiction, heard in this court, no objection to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence shall be entertained, unless such objection was taken in the court below and entered of record. Where objection was not so taken the evidence shall be deemed to have been admitted by consent."

The affidavit of Milton Jacobs (R., pp. 78-80) listing the newspaper quotations for the securities corroborates the dealers' affidavits by evidence which has the highest probative value and which is clearly admissible. The New York Times and The Commercial and Financial Chronicle, which are cited in Mr. Jacobs' affidavit, are highly regarded in financial circles and their reputation for reliability and accuracy is second to none (R., p. 79). Trade papers have always been admissible in New York as evidence of market prices, after proof of their reliability.

Watts v. *Phillips-Jones Corporation*, 211 App. Div. 523, 531, affd. 242 N. Y. 557.

The favorable attitude toward such evidence is illustrated by the statute which now expressly makes newspaper reports of prices on any regularly organized exchange *ipso facto* admissible in evidence (N. Y. C. P. A. §375a; L. 1934, ch. 324).

The statements contained in the affidavits were sufficient to support the Court's finding of value.

Unquestionably the affidavits as to sales and newspaper quotations are evidence of value. The sufficiency of evidence to prove a point when there is *any* evidence is a question of fact and not of law. As such, it is not open for review on this appeal.

The evidence in the affidavits submitted was ample to support the District Court's finding of the value; and this finding was not reversed by the Circuit Court of Appeals. The weight to be given by the Court to the evidence submitted in proof of value is not open to question here, and cannot be disputed by the Referee.

The order of the District Court, in so far as it determined the compensation of the Referee, was appealable only under Section 24b of the Bankruptcy Act and not as of right under Section 24a (*Kinkead* v. *Bacon & Sons*, 230 Fed. 362). Even though an appeal was also improperly taken under Section 24a by the bankrupt, the Circuit Court of Appeals was still limited to a consideration of the questions of law arising out of the facts found or conceded (*Kinkead* v. *Bacon & Sons*, 230 Fed. 362).

POINT IV.

The Court had discretion to limit the Referee's compensation to a reasonable amount.

This bankruptcy proceeding from beginning to end covered a period of slightly less than nine months. The Referee's claim to a fee of $65,040.19 has been sustained by the Circuit Court of Appeals.

The Referee argued below that good conscience had nothing to do with the matter of his fee and that the Referee must be allowed the maximum compensation pro-

vided by the statute, no matter how clearly excessive or really grotesque that might be.

Section 2 of the Bankruptcy Act (11 U. S. C. §11) gives the District Court the broadest possible powers and would seem to indicate that it was not the intention of Congress to leave the fees of the Referee beyond its control. We quote from that Section:

> "§11. *Courts; jurisdiction and powers.*—The courts of bankruptcy as hereinbefore defined • • • are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, • • • (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; • • •
>
> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

The provision of Section 40a:

> "Referees shall receive as full compensation for their services, • • • one-half of one per cent. upon the amount to be paid to creditors upon the confirmation of a composition"

is not mandatory.

Courts have frequently undertaken to interpret "shall" as permissive rather than mandatory when such interpretation was necessary to the ends of justice.

In *Munro* v. *New York*, 223 N. Y. 208, the Court of Appeals said:

> "The words 'shall' and 'must' when found in a statute are not always imperative (*Matter of State of New York*, 207 N. Y. 582, 585).
>
> "The instances are many in which courts have treated a mandatory word as merely permissive when necessary to sustain an act or accomplish the purpose which was clearly intended (*Matter of Rutledge*, 162 N. Y. 31; *Canal Commissioners* v. *Sanitary District of Chicago*, 184 Ill. 597; *State* v. *Strait*, 94 Minn. 384, 391).
>
> "In *Anderson's Appeal* (215 Penn. St. 119) it was said: 'The word "shall" when used by the legislature to a court is usually a grant of authority and means "may"'.
>
> "'As against the government the word "shall", when used in statutes, is to be construed as "may", unless a contrary intention is manifest' (*Railroad Co.* v. *Hecht*, 95 U. S. 168, 170)."

As early as 1885, Judge Wallace declared:

> "The decisions arising upon statutes in which 'shall' has been construed to mean 'may' and 'may' to mean 'shall' are too numerous and familiar to need citation."
>
> *United States* v. *Boyd*, 24 Fed. 692, reversed on other grounds, 116 U. S. 616.

See also:

> *Matter of State of New York*, 207 N. Y. 582, 585;
>
> 59 C. J. 1085.

In considering the need for an interpretation which permits the exercise of discretion, the court may properly

bear in mind that the money and assets which were returned to the bankrupt after the confirmation of the composition are in reality still held for the benefit of bondholders to the extent of their rights under the outstanding bonds retained by them. Therefore, any and all amounts paid to the Referee will be taken out of moneys which might otherwise be applicable to the ultimate payment of bondholders.

The need for exercise of such discretion is shown by the recent report of the Sub-Committee on Equity Receiverships and Bankruptcy of the Committee on Judiciary of the United States Senate, which stated that

> "As a result of the fee and commission system in effect in the bankruptcy courts, instances were brought to our attention where the income of referees exceeded the salaries of the judges of the United States District Court * * *. In consideration of cases which came under our observation, we were impressed by the relatively enormous cost involved in receivership and bankruptcy cases."
>
> (Report No. 365, 73rd Congress (Senate), 2nd Session, 78 Cong. Rec. 3173-3176.)

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed, and the order of the District Judge affirmed.

Dated, March 2, 1935.

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